

## LEGAL AND ETHICAL ASPECTS OF DRUG TESTING\*

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**L**AWSUITS and proposals concerning drug testing by employers have flooded our nation's courts and legislatures in recent years. In prior years, however, both courts and legislatures have addressed a variety of legal issues relating to alcohol and drug abuse. For that reason, it is useful to focus first on how the law views alcohol and drug abuse in the workplace in general, and then move into issues raised by drug testing specifically.

First, both federal and state laws regulate what employers can do when they deal with people who have some type of an illness or disease. Under the Federal Rehabilitation Act of 1973, it is illegal for employers to discriminate against those who have mental or physical impairment. The buzz word that is used in the Rehabilitation Act is "handicapped." Anybody with a physical or mental impairment is deemed to be handicapped and has certain rights.

Under New York State law (the New York State Human Rights Law) anyone with a physical or mental impairment is deemed to be disabled and has certain rights against discrimination.

Furthermore, both of these laws focus not just on those who have a current handicap or disability but also anyone who has a history of the handicap or disability but does not have it now, and anyone perceived to have the handicap or disability even though they may not have it.

Under both the federal and state laws, an employer is prohibited from denying employment or discharging from employment or otherwise disciplining an employee solely because they have a current, former, or perceived handicap or disability. These protections are available to those with a current, former, or perceived alcohol or drug abuse problem because, under both the federal law and the state laws, "handicapped" and "disabled" are defined to include alcoholism and drug addiction, alcohol, and drug dependency. Those are handicaps or disabilities, as are heart disease, being blind, or having a

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\*Presented in a panel, Legal and Ethical Aspects of Drug Testing, as part of a *Symposium on Drug Testing in the Workplace*, held by the Committee on Public Health and the section on Occupational Medicine of the New York Academy of Medicine February 3, 1988.

mental illness such as schizophrenia. Any physical or mental impairment, and that includes alcoholism and drug addiction, are covered handicaps or disabilities.

Therefore, if someone has a current alcohol or drug problem or history of abusing alcohol or drug abuse, they are covered under the law and cannot be disciplined or denied employment solely on that basis. Of course, that does not mean that employers can never take any action when someone with a current or former alcohol or drug problem applies for a job or is already working there. There are two situations in which employers can take action. First, an employer may refuse to hire, fire, or otherwise discipline an individual whose current abuse of alcohol or drugs prevents the person from performing his job. Second, an employer may take action against an individual if his alcohol or drug problem would constitute a direct threat to the safety of coworkers or others.

Of course, nothing prevents an employer from enforcing proper work rules prohibiting possession or sale of drugs on the job or intoxication on the job. However, employers are best advised to establish those rules in writing and distribute them to all employees so that everyone will know the rules and that if they violate them they are subject to whatever punishment there may be.

Looking at these rules from the other direction, if an individual who is a current or former alcoholic or drug abuser can perform the job safely and is not a direct threat to others, the employer cannot take disciplinary action. Employers should certainly, however, take steps to encourage untreated substance abusers to seek the help they need.

Once we understand these basic rules regarding employment of people with histories of alcohol and drug abuse, we can move to the area of drug testing. At the outset it is important not to be confused by a lot of the studies and newspaper articles that one sees that this percentage of the *Fortune* 500 or that percentage of the *Forbes* 400 is drug testing or not testing. A number of different types of drug-testing programs are being done; these programs vary in their approaches to such issues as who is tested (just applicants or also employees?); when are they tested (randomly or with reasonable suspicion or at the time of application?); and what are the consequences of a positive test result (treatment or punishment?).

From our anecdotal information at this point, as far as we can see, most employers that are drug testing still limit it to applicants. Obviously, one of the employers that is now testing employees is the federal government.

This issue obviously raises a lot of different conflicting emotions, and I think that part of the reason it is so controversial and difficult to handle is

because there are valid interests on all sides of the issue. There is a genuine concern about dealing with a drug problem, genuine concerns about accuracy, about individual rights. There are also genuine concerns about what ought to be done with drug test results, i.e., the treatment versus punishment debate alluded to above.

The many legal issues regarding drug testing can be roughly separated into three general categories. First, when can a drug test be required by an employer of an employee? Second, what procedures should be used to ensure the accuracy and fairness of drug testing? Third, what steps can an employer take when a test is positive?

The question when an employer can legally make drug testing a condition of employment has led to a great deal of litigation. The main issue has been a constitutional one: is it an unreasonable search and seizure for an employer to conduct random drug testing? If one turns it around, another way to state the issue is, does an employer need reasonable suspicion or probable cause to require a drug test?

It is crucial to realize that this issue only arises in the context of public employment. Constitutional rights under the Bill of Rights only apply against the government.

An illustration from outside the drug testing issue might help to clarify this point. If someone is on a street corner giving a speech and a police officer interferes with that speech, the individual could sue that police officer for violating the First Amendment right to freedom of speech. But if a private citizen got into an argument or otherwise peacefully interfered with that same speech, the speaker would have no lawsuit against the private citizen because there was no government interference with the right to speak.

Similarly, in the context of drug testing Fourth Amendment issues arise only if a governmental employer wants to draw that urine sample. Private employers are not governed by the Fourth Amendment. The only exception to this rule is the State of California. California's state constitution goes beyond governmental action and actually reaches private citizens, but that is the only state that does that; the federal constitution does not and New York's does not.

Even in those situations where the Fourth Amendment and similar state constitutional protections apply, the courts have disagreed rather sharply whether random drug testing is permissible. There have been five decisions on this issue by the United States Courts of Appeals in different parts of the country, the level of courts just below the Supreme Court of the United States. Many lower court decisions have found that reasonable suspicion is

required before there can be a drug test. But it is more of a mixed picture when you get into the appeals court.

For instance, in *Shoemaker v. Handel*, 795 F.2d 1136 (1986), the Third Circuit ruled that jockeys can be tested without reasonable suspicion. The court took great pains to emphasize that its decision was based on the unique nature of the horse-racing industry in New Jersey as being very strictly regulated.

In the next decision, the Eighth Circuit ruled that the Corrections Department could randomly test employees who have regular contact with prisoners on a daily basis, but other employees could only be tested if there existed "reasonable suspicion" that the individual has an alcohol or drug problem. *McDonell v. Hunter*, 809 F.2d 1302 (1987) "Reasonable suspicion" means reason to suspect based on some specific facts, evidence, observations, or inferences that arise from those objective facts that a specific individual—not simply the workforce in general—may have a substance abuse problem.

The next decision was in Louisiana. In *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (1987), *cert. granted* 56 U.S.L.W. 3590 (March 1, 1988)(No. 86-1879) the Fifth Circuit ruled that the Custom Service may require drug tests from applicants and candidates for promotion to certain positions. The court focussed primarily on the nature of the jobs involved—customs officials searching for drugs as part of the nation's drug enforcement effort.

The fourth Courts of Appeals decision was *National Federation of Federal Employees v. Carlucci*, 818 F.2d 935 (1987) in which the District of Columbia Circuit found drug testing of civilian military employees unconstitutional absent reasonable suspicion of drug abuse while on duty. And in the fifth decision, *Railway Labor Executives' Assoc. v. Burnley*, 2 IER Cases 1601 (1988) the Ninth Circuit similarly ruled that Federal Railway Administration regulations authorizing mandatory postincident testing even without such a reasonable suspicion were unconstitutional.

Another important case, and perhaps the most important of all for New York State, is the decision of the state's highest court, the Court of Appeals, in *Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y. 2d 57 (1987). The Court of Appeals, in interpreting the state as well as federal constitution, outlawed random drug testing for teachers. A second New York case, *Caruso v. Ward*, 520 NYS 2d 551 (App. Div. 1st Dept. 1987), found it unconstitutional for New York City randomly to drug test police officers in the organized crime control bureau.

It may take a ruling, or a series of rulings, from the United States Supreme

Court to resolve these issues. Indeed, the Supreme Court recently agreed to hear an appeal of the Fifth Circuit decision in the Van Raab case discussed above.

Two other considerations must be addressed in determining whether drug testing is permitted. First, an employer can bargain away or give away its right to test for drugs. If, in a collective bargaining agreement, personal contract, policy statement, or some other mechanism an employer puts limitations on its right to drug test or eliminates it, it would be bound by that.

Second, both the Rehabilitation Act and the Human Rights Law prohibit pre-employment medical tests that are not job related. The New York State Division of Human Rights, the agency that enforces New York's law, in the last couple of years has gotten very strict in limiting what employers can do pre-employment about medical exams. However, it is unclear what the division or the courts that might be called on to interpret the federal and state anti-discrimination laws would do when it comes to deciding whether drug tests are permitted under these guidelines.

A second set of legal issues regarding drug testing concern accuracy and procedural fairness. A number of legal challenges to drug testing have been based on those issues in courts as well as arbitrations. There are several ways in which false positives—the test comes back positive even though the individual did not use the drug specified—can occur. A break in the “chain of custody,” a mistake by the laboratory (e.g., not properly cleaning the instruments after each test), failure to double test with a more accurate confirmatory test such as gas chromatography with mass spectrometry, and similar errors can all lead to false positives.

While anyone conducting a drug test should obviously take all possible precautions to minimize mistakes, there is no way completely to eliminate false positives. Wherever one has human beings one will always have human error.

The third issue is what can an employer do with a positive result? As discussed above, an employer cannot refuse to hire or fire someone or discipline someone because of an alcohol or drug abuse problem by itself. There must be some relation to ability to perform the job in a safe manner.

If a drug test reveals that an employee has an alcohol or drug abuse problem, that is not by itself grounds for dismissal. The employer must have some evidence that a drug problem would prevent that individual from performing the job or performing in a safe manner. Regardless of whether an employer may fire or otherwise discipline an employee, an employer can and should refer someone in need of treatment to the appropriate service provider.

In terms of what an employer can do with a positive result for applicants, once again it is unclear what limitations, if any, the Rehabilitation Act and Human Rights Law place on an employer's use of pre-employment drug testing. The key question is, in the pre-employment setting is a drug test job related? Another way of saying that is that if there is a positive result, does that mean anything by itself in terms of the person's ability to do the job? These are questions for which we shall have to wait for guidance from relevant agencies and the courts.

The Legal Action Center believes that drug testing should be limited to reasonable suspicion or probable cause testing. The principal reason for this belief is that we do not think that random drug testing is an effective tool with which to find drug abuse. Drug testing is often inaccurate, never able to single out those who are impaired or intoxicated at the time of the test or while at work, and is always expensive.

Furthermore, random drug testing rarely goes after the drugs that are most abused: alcohol and prescription drugs. The illegal drug most often detected is marijuana. One does not have to condone marijuana use seriously to question whether it makes sense to pour so much expense and effort into a drug testing program that is only good at detecting marijuana.

Significant civil rights concerns are also raised by random drug testing that, when combined with the severe limitations on its utility, simply outweigh whatever limited benefits might accrue from testing.

We urge employers to establish instead comprehensive employee assistance programs that provide education and training, diagnosis, and referral to appropriate treatment. If drug testing is used on a reasonable suspicion basis (or even if it is not), the employer should take all possible steps to ensure accuracy of the test results and should give written notice to their employees about what the policy is.